

Court of Appeals, State of Michigan

ORDER

Gloria Rocha v Better Built Manufacturing Inc

Docket No. 297090

LC No. 09-011528-NP

Michael J. Talbot
Presiding Judge

Elizabeth L. Gleicher

Michael J. Kelly
Judges

The Court orders that the June 21, 2011 opinion is hereby AMENDED. The initial paragraph of the opinion mistakenly indicates that Gloria Rocha was an employee of Better Built Manufacturing, Inc. and Roy Peterson. The initial paragraph should read as follows: Gloria Rocha challenges the trial court's failure to award her any economic damages in her judgment against Better Built Manufacturing, Inc. and Roy Peterson for serious injuries she incurred at her place of employment while using a machine manufactured by Better Built Manufacturing, Inc. and Roy Peterson.

In all other respects, the June 21, 2011 opinion remains unchanged.



A true copy entered and certified by Larry S. Royster, Chief Clerk, on

JUL 06 2011

Date


Chief Clerk

STATE OF MICHIGAN
COURT OF APPEALS

GLORIA ROCHA,

Plaintiff-Appellant,

v

BETTER BUILT MANUFACTURING, INC., and
ROY PETERSON,

Defendants-Appellees.

UNPUBLISHED

June 21, 2011

No. 297090

Montcalm Circuit Court

LC No. 09-011528-NP

Before: TALBOT, P.J., and GLEICHER and M. J. KELLY, JJ.

PER CURIAM.

Gloria Rocha challenges the trial court’s failure to award her any economic damages in her judgment against Better Built Manufacturing, Inc. and Roy Peterson for the serious injuries she incurred while their employee. We vacate and remand.

Rocha was injured at work when her sweatshirt sleeve caught on the conveyor of a potato seed cutting machine. Rocha’s arm was pulled into the machinery, resulting in a below the elbow amputation. Rocha sued both Better Built Manufacturing, Inc. and its president Roy Peterson because both were involved in manufacturing the allegedly defective machine. Neither Peterson nor Better Built filed an answer and a default judgment was entered. A hearing was conducted regarding Rocha’s damages, and the trial court ultimately awarded her \$1.5 million for pain and suffering along with interest and costs for a total judgment of \$1,542,188.55. The judgment indicated that the trial court awarded Rocha no economic damages. Rocha contends that the trial court erred by ignoring the uncontroverted evidence of her economic damages in determining an award.

We review the damage award in a bench trial for clear error.¹ “Clear error exists where, after a review of the record, the reviewing court is left with a firm and definite conviction that a mistake has been made.”² “A party asserting a claim has the burden of proving its damages with

¹ *Marshall Lasser, PC v George*, 252 Mich App 104, 110; 651 NW2d 158 (2002).

² *Id.* (citation omitted).

reasonable certainty,” but “damages are not speculative merely because they cannot be ascertained with mathematical precision.”³ Approximate amounts are sufficient to constitute a reasonable basis for damage computation.⁴

Rocha submitted evidence of economic damages, including wage loss, medical expenses to date, future medical expenses, and future prosthesis replacement expenses. The evidence consisted of Rocha’s testimony, figures calculated by the worker’s compensation insurer, deposition testimony of her treating physician, expert opinions, and information obtained from online sources. Rocha testified that she was unable to perform many tasks, would not be able to return to her former job, and that she experiences pain and psychological problems as a result of the injury. Evidence was provided demonstrating that Rocha’s prosthetic arm will require periodic replacement and that she will likely be involved in therapy for the remainder of her life. Neither Peterson nor Better Built challenged Rocha’s proofs.

We find it difficult to reconcile the trial court’s acknowledgment regarding Rocha’s proofs with its ruling declining to enter an award for economic damages. When a verdict ignores uncontroverted damages the verdict is deemed to be inadequate and must be reversed.⁵ On the record before us, we find that Rocha submitted adequate proofs to provide a reasonable basis for computation of her current and future economic damages. The failure of the trial court to award such damages constituted error.⁶

It would appear that the trial court omitted an award of economic damages based on Rocha’s indication that she was the recipient of worker’s compensation benefits. Although Rocha would not be entitled to a double recovery, it is not clear from the record that an offset of all proven economic damages was either necessary or warranted in this case. As a collateral source, worker’s compensation benefits should be offset from a damages award unless the recovery is subject to a valid lien held by the worker’s compensation insurance carrier.⁷ While the lower court record lacks any definitive documentation demonstrating whether the worker’s compensation benefits received by Rocha were subject a lien, trial counsel and the court both indicated that a valid lien did exist. Assuming the existence of a valid lien, an offset was not permissible.

³ *Hofmann v Auto Club Ins Ass’n*, 211 Mich App 55, 108; 535 NW2d 529 (1995).

⁴ *Id.*

⁵ *Bosak v Hutchinson*, 422 Mich 712, 732; 375 NW2d 333 (1985), overruled in part on other grounds *DeShambo v Nielsen*, 471 Mich 27, 40; 684 NW2d 332 (2004).

⁶ *Marshall Lasser, PC*, 252 Mich App at 110.

⁷ *Heinz v Chicago Rd Investment Co*, 216 Mich App 289, 296-297; 549 NW2d 47 (1996).

In addition, we observe that the trial court did not fully comply with statutory requirements⁸ specifying any breakdown and distinction between future and present damages.⁹ The record is also deficient with regard to evidence pertaining to the types of worker's compensation benefits being received by Rocha and the specific amounts.¹⁰ We do find that the trial court erred in failing to award economic damages based on the uncontroverted evidence. If on remand there is verification regarding the existence of a lien, in accordance with statute, workers compensation benefits do not comprise a collateral source and are not subject to an offset.¹¹

Rocha also contends that the trial court erred because the record clearly demonstrated that the trial court misconstrued and failed to recognize the inherent distinction of what comprises noneconomic and economic damages. While we need not reach this argument based on our determination of other reversible error by the trial court, we note that Rocha premises this argument on the trial court's denial of reconsideration when it indicated that it considered out-of-pocket expenses in the award of pain and suffering damages. As correctly recognized by Rocha, out-of-pocket expenses comprise economic damages while pain and suffering is a noneconomic damage.

We vacate only that portion of the judgment awarding zero economic damages and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ Elizabeth L. Gleicher
/s/ Michael J. Kelly

⁸ MCL 600.6306.

⁹ *Campbell v Dep't of Human Servs*, 286 Mich App 230, 244-245; 780 NW2d 586 (2009).

¹⁰ "Worker's compensation benefits address medical expenses and wage loss, but not 'general damages' or loss of consortium suffered when the injured party is still alive." *Heinz*, 216 Mich App at 305.

¹¹ MCL 600.6306(4).